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SUPREME COURT OF THE UNITED STATES,

October Term, 1888. No. 154.

Parley's Park Silver Mining Company,
Appellant,

vs.

John W. Kerr,
Appellee.

APPELLEE'S BRIEF.

CHARLES W. BENNETT,
Attorney for Appellee.

Star Print, Salt Lake.

No. 154.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

PARLEY'S PARK SILVER MINING COMPANY,
Appellant,

vs.

JOHN W. KERR,
Appellee.

APPELLEE'S BRIEF.

This action was brought under Sec. 254 of the Utah Statutes of 1876, which reads:

"An action may be brought by any person in possession; by himself or his tenant, of real property, against any person who claims an estate, or interest therein, adverse to him, for the purpose of determining such adverse claim, estate or interest."

The plat, "Exhibit 3," between pages 16 and 17 of the printed record, shows the outlines of the mining claims owned by the parties, and the areas in controversy.

The facts were agreed upon, and included in stipulations which were printed pp. 4 to 6 inclusive, and the mining customs of the district are printed pp 11 to 17, inclusive. These, with the plat, give all the facts, and are adopted as a finding of facts by the trial court—pp. 6 and 7.

The appellant owned the Lady of the Lake and the Cen-

tral mining claims, and the appellee owned the Clara mining claim.

The plat shows two distinct areas are in conflict; a small one between the Lady of the Lake and the Clara, and a larger one between the Central and the Clara mining claims.

Some errors and omissions occur in the printed record, especially in the answer, but not of sufficient importance to mislead as to the issue. The date in the stipulation, top of page 6, is corrected by stipulation filed herein so as to read May 4th and conform to the original record in the court below.

By referring to the agreed facts, adopted as findings, the the following dates appear:

Clara Mining Claim :

Located June 28th, 1872.
Surveyed for patent, March 31, 1876.
Application for patent, April 28, 1876.
Entered and paid for, Feb. 20, 1879.
Patent issued, Feb. 6, 1880.

Lady of the Lake Mining Claim :

Located, July 25th, 1875.
Surveyed for patent, July 8th, 1876.

Central Mining Claim:

Located, August 19th, 1876.
Surveyed for patent, Aug. 2, 1880.

Referring first to the smaller area which is in conflict be- the Lady of the Lake and the Clara mining claims, the facts show:

That the application for patent for the Clara mining claim included an application for the Clara mill site, which also conflicted with the Lady of the Lake. That the owners of the latter within the period of publication, made an adverse claim. As the conflict with the mill site was the main ground of controversy, upon a settlement, the adverse claim in behalf of the Lady of the Lake mining claim was not only withdrawn, but the owners of the last named claim (appellants' grantors), released to the United States the ground embraced in this area;

therefore, it ceased to be a part of the Lady of the Lake mining claim. The appellant, in its official survey of the Central mining claim, omitted and abandoned this same area.—Sec. 2 of facts, p. 4, and Sec. 6, p. 5. Therefore, as to this smaller area, the appellant has no standing. This area is released from one of its claims, and the other does not embrace it.

Referring now to the larger area, the dates and facts show: that the Clara mining claim was located, officially surveyed for patent, application for patent made and the period of publication passed, before the Central mining claim was located.

For the appellee the following points are submitted:

I.

The complaint is insufficient to admit proof attacking, or to justify a judgment annulling, a patent of the United States.

This point was raised in the trial court, (last part p. 8) repeated on appeal, and though the trial court decided the case on the merits, the Territorial Supreme Court affirmed this point. Opinion, pp. 18 and 19.

The statute only enlarges the class of cases in which equitable actions *quia timet* could formerly be brought, and dispenses with the pre-requisite that the plaintiff must first establish his title at law.

Curtis vs. Sutter, 15 Cal. 260.

The nature of the action assumes now, as formerly, that the plaintiff has the better legal or equitable title. In case the patent title from the United States is in the defendant, it is impossible for a plaintiff to recover either at law or in equity, unless he can annul that title, or show it is held in trust for him. To do either, this general form of complaint cannot be adopted. Here the only facts alleged are that the plaintiff is the owner and in possession, and that the defendant makes an adverse claim.

The complaint should have admitted the patent, and shown facts entitling the plaintiff to a judgment annulling it, and to

do this the facts to show fraud or mistake in procuring it should have been specially pleaded, so that issue could have been taken on them.

If the defendant had brought ejectment on his patent title, the plaintiff, under the code system, could have set up any equitable defense, but if he admitted the legal title in the plaintiff, he would have to become an actor and make his defense as full as a bill in equity, by pleading all the facts and demanding the proper relief. A general denial of the plaintiff's title, or an allegation of title in the defendant would be insufficient.

Gibson vs. Chotteau, 13 Wall., 92.
Bruck vs. Tucker, 42 Cal., 346.

The impropriety of a judgment in favor of a plaintiff, with a perfect legal title outstanding against him, and which should neither be annulled nor held to be in trust for the plaintiff, is shown in

15 Barb., 365.
34 Wis., 486.
35 Wis., 361.

II.

The judgment is right on the merits, irrespective of any question of pleading.

It is claimed by the appellant that the patent for the Clara mining claim, should have embraced a width of only 200 feet. The first rule adopted in the district, May 17, 1870, (erroneously printed 1879 in the record) Section 4, top of page 12, is cited by appellant to maintain this position. It provided: "The surface width of any mining location shall not exceed 100 feet in width on each side the wall rocks of said lode."

This gave 200 feet and the width of the lode, whatever that might be.

On May 4th, 1872, a meeting was held to alter and amend the rules. It was then known to the miners of the district that the act of Congress of May 10th, 1872, was about to become a law, and they probably supposed it had passed, or at least

gone to the President for approval (Sec. 7 of ~~argued~~ agreed facts, top of page 6, as corrected to May 4th, by stipulation). At this meeting *an entire new code* was adopted, and in view of the anticipated legislation by Congress, they provided in Section 14 that "The surface width shall be governed by laws of the U. S. A. Record, p. 13. In Section 19, (p. 14 of Record) they added a general repealing clause.

The Clara was located under this code, and after the act of Congress permitting locations not exceeding 300 feet in width on each side of the centre of the vein, and before the next meeting of the miners, held July 10, 1872.

We understand the appellant to argue, in effect, that the customs of miners, when shown, have the force of law in controlling the sale of mineral lands; that the rule of May 17, 1870, allowing 100 feet on each side of the wall rocks, was not repealed by Section 19 of the code of May 4th, 1872, because the old section was not in conflict with the last named code, or any law of the United States then existing, or afterward enacted.

It is submitted that the written evidences of the customs of miners cannot properly be construed by any such close or rigid rules of interpretation, nor by the strict rules applicable to the repeal of laws. These codes are merely evidence for the time of what the miners agree shall be their customs, and the only value of the written evidence is that it puts the agreement as to the custom in express accessible form, instead of leaving the agreement to be implied from the usage in the district. Such codes also serve to mark distinctly the point of time when there is a change in the rule or custom. They differ so widely from a law that they become obsolete by non-user, and are repealed by a contrary common usage shown by parol.

Harvey vs. Ryan, 42 Cal., 626.

It is manifest that a law enacted by a legislative body is controlling until repealed expressly or by implication, and a usage to the contrary would not affect its validity. The sole question should be what did the miners mean? When this is ascertained, effect will be given to their intention without re-

spect to the manner in which it is expressed. That the miners intended to pass an entire code on the 4th of May, 1872, seems clear from its contents, compared with the code of 1870, and hence, if a repeal was necessary, a repeal by implication would ensue as to all subjects covered by the new code. But no repeal was necessary in such a case. They had merely to declare what the custom should be from that time, and they did so by declaring they would have no rule on the subject of width, but leave that to the Act of Congress. Nothing can be clearer than their declaration to this effect. They made no provision as to width, and to explain why this omission occurred in their code, they declare the omission is intentional and for the purpose of allowing locators to take whatever width the laws of the United States may permit. The intention of the miners, and their construction of the rule appears from the action at the meeting of July 10th, 1872. Then they again adopted an entire new code, and they show they considered the code of may 4th complete and the only rules in existence, by their method of proceeding. They make a new code by adopting ("accepting" they call it) certain sections of the May code by numbers, and passing new sections to complete the code. Among the new sections is one limiting width to 100 feet on each side of the vein. They do not adopt this from the code of 1870, or make any reference to that code or any of its provisions. It may be further noticed that the meeting of May 4, 1872, was to *alter and amend* the by-laws. Any provisions in regard to width, differing from the former rule, would be an amendment or alteration of the rule without any regard to any express repeal. All these by-laws were presented to the commissioner with the application for patent for the Clara mining claim (additional stipulation, p. 6 of record), hence the patent was granted on the same facts now presented to the court as ground for annulling it, and no further or additional facts are produced. On these facts the appellant claims the patent, as to the excess beyond 200 feet in width is absolutely void, and as much a nullity as if granted without authority of law, or for lands reserved from sale or previously granted. The contention of the

appellee is that the commissioner correctly interpreted the by-law and that the patent is valid.

Even if the commissioner misconstrued the by-law, the appellee contends the patent is not void, and cannot in this action, and under these pleadings be attacked. That it would not be voidable even if attacked in a proper action and under proper pleadings. It is not disputed it covers mineral lands subject to sale and conveyance in this manner. There was no public law limiting the width allowed to less than the patent covers. It was for the applicant to show, as facts, that he had located, held and improved this claim in accordance with the general laws and local customs. He presented these rules, with his application as evidence he had not exceeded the width allowed by the custom of the district. The commissioner took official notice of the general law, with which the applicant must comply. He could not take official notice of what the local custom was as to width of claim, for that was an extrinsic fact.

Harvey vs. Ryan, 42 Cal., 626

He construed the evidence of this fact in accordance with the applicant's claim, and decided as a fact that the local custom as to width had not been exceeded. By his action the commissioner determined facts witl.in his jurisdiction. In a general way he had to receive evidence and decide whether the applicant had done all the acts required by law and custom, and in a more especial way he had to receive evidence and decide what in fact the custom as to width was, with which the applicant must comply. If he erred in deciding on the weight, sufficiency or effect of the evidence, as to a fact within his jurisdiction, no fraud, deception, or mistake of law being shown, this court will not collaterally review that decision on the same evidence. To do this the court must go back and take exactly the place of the commissioner in the original application, and adjudge *de novo*, questions of fact which the law has placed within his jurisdiction.

It may be proper to notice here that the appellant has had an opportunity to be heard on the questions now raised, and on the same evidence, both before the commissioner and